Supreme Court, U. S.
FILED
OCT 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1978
No. 79-374

BIRMINGHAM TRUST NATIONAL BANK,
Petitioner,

v.

JACK H. HARRISON, Temporary Trustee of the Linn-Henley Charitable Trust; CHARLES A. GRADDICK, Attorney General of the State of Alabama; and JOHN C. HENLEY, III,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 29, 1979

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JACK H. HARRISON, Temporary Trustee of the Linn-Henley Charitable Trust; CHARLES A GRADDICK, Attorney General of the State of Alabama; and JOHN C. HENLEY, III,

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Brief in Opposition to Petition for Writ of Certiorari

The purpose of this argument is to answer each of the arguments contained in the Reasons for Granting the Writ in the Petition filed by Birmingham Trust National Bank; to seek to persuade the Court to deny the Petition for Certiorari; to convince the Court that there is no conflict of decisions; to show the Court that the decision is not important; and, to show the Court that the decision below was correct.

Petitioner, hereinafter referred to as "BTNB", in brief summary, has asked this Court to hold that the decision of the Alabama Court conflicts with applicable decisions of this Court concerning the controlling effect of federal law, the reviewability of administrative determinations

that are committed to a "final and binding" determination by an administrative official, and the attacking of these administrative determinations in collateral proceedings. Petitioner has further sought to show that the decision below represents the only available judicial statement on the kinds of evidence that may be considered in determining the "value" of national bank stock under 12 USC 215a (c) and (d) and that the decision below reaches a result that allows dissenters to reap benefits from the subsequent success of an enterprise that they chose to abandon. Each of these arguments are totally without merit.

The decision below arose from the trial court's finding that petitioner, a national bank, breached its fiduciary duty to the trust in several and various ways. The gravaman of the complaint on behalf of the trust was not, as BTNB states, the supposedly inadequate amount fixed by the Comptroller in his appraisal of the old bank stock; instead, the gravaman, or grievance, specially complained of was various charges of fiduciary abuse suffered by the trust at the hands of BTNB, including, but certainly not limited to, such grievances as the failure to provide certain necessary information to the Comptroller regarding the appraisal, the failure by BTNB to purchase for the trust certain stock offered at auction, the failure by BTNB to concur in the co-trustee's recommendation to purchase certain other common stock and BTNB's breach of its fiduciary duty to the trust by engaging, for their own benefit and at the expense of the trust, in actions of self-dealing, trickery, intentional hampering, and acts of economic threats and actual reprisals directed at the co-trustee. Simply stated, the gravaman of the complaint on behalf of the trust was continued and prolonged breaches of fiduciary duty by petitioner towards the trust, all for the benefit of the BTNB and at the expense of the trust.

The lower court's decision in the instant case dealt explicitly with the issue which was before it--the fidelity vel non of a co-trustee. The lower court dealt with a breach of fiduciary duty in the context of the law of trust, not in the context of those duties owed by a bank to its dissenting stockholders absent the trustee relationship. This is the point BTNB seems to omit. We point out that we are not dealing with a review by the lower court of a finding by the Comptroller but instead with a review of the fidelity vel non of the co-trustee, BTNB, in the context of the law of trust.

BTNB recognizes in brief that national banks are subject to state law unless these state laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions. This court has more than once held that the national bank organized under the Acts of Congress are subject to state supervision, except where such supervision is in conflict with some Act of Congress or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of the their creation. Waite v. Dowley, 94 U.S. 527, 533, 24 L. Ed. 181, 182 (1877); Anderson National Bank v. Luckett, 321 U. S. 233, 88, L. Ed. 692 (1944). Additionally, the act in question, 12 USC 215, implicitly recognizes the proposition that a national bank acting as a fiduciary under appointment by a state court is subject to supervision or removal by that court, saying, at 12 USC 215 a (f):

> "...nothing contained in this section (215) shall be considered to impair in any manner the right of any court to remove the consolidated national banking association and to appoint in lieu thereof a substitute... fiduciary except that such right shall not be exercised in such a manner as to discriminate against national banking associations,

nor any consolidated national banking association be removed solely because of the fact that it is a national banking association."

Thus, state courts are not foreclosed by 12 USC 215 to decide the question of breach of fiduciary duty by a national bank involved in merger as provided for by that act. The state law is controlling, insofar as it does not conflict with some Act of Congress or tend to impair the utility of such banks as instrumentalities of the United States or interfere with the purposes of their creation. There has been no showing by BTNB, nor does any exist, that the decision by the lower court under state law has impaired the utility of BTNB as an instrumentality of the United States or that it interferes with the purposes of BTNB's creation. State law is controlling in this regard.

Regardless of the fact that the lower court based its review on the fidelity vel non of a co-trustee, and not on a review of the Comptroller's finding, BTNB asserts that the Comptroller's appraisal shall be "final and binding", and that the "value" fixed by the Comptroller should fully protect shareholders who are dissatisfied with the merger. BTNB even states that the terminology "shall be final and binding" is plain enough and that it is entirely consistant with the broad supervisory powers given the Comptroller over national banks that Congress would also intend that the Comptroller have the final say on this question of valuation. Such could not be further from a correct statement of the law.

It is contended here that the "final and binding" provisions of an Act of Congress pertaining to administrative boards applies only to administrative finality. Brownell v. Tom We Shung, 352 U.S. 180, 1 L. Ed 2d 225, 229 (1956). If Congress had intended these "final and binding" or "final and conclusive" terminologies to preclude judicial review,

Congress would have expressly stated such. For instance, in several Congressional statutes dealing with veteran's benefits, Congress did not stop with the words "final and conclusive", but continued with the terminology that, "and no other official or any court of the United States shall have power or jurisdiction to review any such decisions." Davis, Administrative Law Treatise, section 28.15, p. 77, f.n. 1.

It is imperative to point out that such terminology is not, as BTNB states, "plain enough", nor would Congress intend, under facts such as exist here, that the Comptroller would have the final say on this question of valuation. Where, as here, one co-trustee has breached its fiduciary duty to the trust by failing to provide adequate data to the Comptroller which would have resulted in a higher appraisal of the old bank stock than that originally fixed, is the state court reviewing the act of such co-trustee to be bound by such administrative finality? Of course not! It cannot be supposed that Congress intended by 12 USC 215 with its finality provisions to condone all frauds or to prevent the correction of mistakes or errors. Had Congress so intended, they would have specifically so stated. Fundamental principles of our jurisprudence insist that there be some type of review of final, substantive agency action which seriously impairs or affects personal or property rights. Gardner v. Toilet Goods Association, 387 U.S. 167, 18 L. Ed. 2d 704, 711, (1967). To hold that the terminology "final and binding" is "plain enough" and that the Comptroller has the final say at all times on the question of valuation would smack directly in the face of existing law. Such finality provisions apply only to administrative finality. Brownell v. Tom We Shung, 352 U.S. 180, 1 L. Ed. 2d 225, 229 (1956). It is contended here that the statutory provision that a decision of the administrative agency shall be "final and binding" means only that the decision is final when it

has been arrived at by a legally constituted agency, in a legal manner, pursuant to competent evidence, without the abuse of discretion, and is not arbitrary or fraudulent. It is further contended that the words, as used in 12 USC 215, contemplate that the decision shall be final in that agency or department so that the higher eschelons of the government office will not be burdened with the duty of reviewing it and does not take away the aggrieved party's right of redress in the courts. Bryan v. Union Oil, 155 F. 2d 625, 627, (CCA 9, 1946) (statute making final the decision of the Commissioner of Navigation on questions relating to collection and refund of tonnage tax).

BTNB continues this line of argument by asserting that the decision below, as a review of the Comptroller's finding, represents the only available judicial statement on the kinds of evidence that may be considered in determining the "value" of national bank stock in situations involving dissents from the mergers of national banks.

The trial court was instructed, on order for a new trial, to ascertain what data should have been made available to the Comptroller but for the conflict of interest which existed. From this data, the trial court was directed to ascertain the value of the "old bank" stock. The findings of the court below as to such data and the valuation of the stocks are grounded upon criteria and material factors which have been established by numerous decisions. See in this regard Ahlenius v. Bunn and Humphreys, 358 Ill. 155, 192 N.E. 824, 95 ALR 913; also, Ann. 48 ALR 3d 430.

The trial court properly considered all relevant facts, including the facts that BTNB would continue as an ongoing concern, the future prospects and growth potentiial of the bank, an estimate of its future earnings and payment of dividends, the expected growth of the bank in earnings and dividends for the future, and the plans and goals which were known, or should have been known to the management of BTNB. The ascertainment of value is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. Standard Oil Company v. Southern Pacific Company, 268 U.S. 146, 156, 69 L. Ed. 890 (1925).

Even in the hands of expert appraisers, valuation is often complex and difficult. For this reason, our Courts generally recognize that valuations of stocks contemplate economic, rather than legal, questions and that these questions, often complex since they vary with each case, should be left to qualified appraisers who are knowledgeable about corporate securities and finance. Jeffrey v. American Screw Company, 98 R.I. 286, 201 A. 2d 146, 152 (1964). Furthermore, deference to the expertise of the appraisers is inevitable, and Courts have been reluctant to disturb the appraisers' findings unless the figures are arbitrary or based on unreasonable premises. "Valuation of Dissenters' Stock Under Appraisal Statutes", 79 Harv. L. Rev. 1453. Each of these admonitions was adhered to in the instant case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. O'Kelley, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 26th day of October, 1979, I did serve a copy of the foregoing Brief in Opposition to Petition For Writ of Certiorari on the following attorneys, by mailing a copy of the same to each of them, postage prepaid and properly addressed as follows:

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